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In the Supreme Court of the United States

OCTOBER TERM, 1982

MASHPEE TRIBE
PETITIONER

v.

NEW SEABURY CORP., ET AL.
RESPONDENTS

Reply Brief for Petitioner

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Introduction

Respondents' briefs in opposition contend that petitioner's case does not present substantial questions; that the Mashpee Tribe is neither federally recognized nor on the current list of federal Indian tribes; that there were no exceptional circumstances warranting recall of mandate by the Court of Appeals; that petitioner's motion to recall mandate and vacate judgment was untimely; and that a second action, *Mashpee Tribe v. Watt*, 542 F.Supp. 797 (D.Mass. 1982), *aff'd*, 707 F.2d 23 (1st Cir. 1983) (*Mashpee II*) seeking the "same land" from the "same defendants" based on the "same legal theories" was recently dismissed. Petitioner will briefly discuss each of these arguments.

Argument

Respondent Town's contention that petitioner does not meet the considerations set forth in Sup.Ct.R. 17 is frivolous.

First and foremost, as petitioner clearly shows in instant petition, the First Circuit's order that petitioner's motion to vacate and substitute judgment be returned without filing or hearing, so far departs from "the accepted and usual course of judicial proceedings ... as to call for exercise of this Court's power of supervision." Sup.Ct.R. 17.1(a).

Second, the Court of Appeals, by allowing *Mashpee Tribe v. Town of Mashpee*, 447 F.Supp. 940 (D.Mass. 1978), *aff'd sub nom., Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir.), *cert. denied*, 444 U.S. 866 (1979) (*Mashpee I*) to stand in light of petitioner's submission, in effect conflicts with *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 419 (1866) (recognition of tribe by political departments of federal government binds the courts), and with *Wilbur v. United States*, 281 U.S. 206, 221 (1930) (whether tribe is still existing is question of law for court). *See* Sup.Ct.R. 17.1(c).

Third, the "non-decision" by the First Circuit results in the anomaly that Indian tribes on the same federal lists as the Mashpees (Pet.App. B) are having their claims heard in the Second Circuit without any question of tribal existence. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974); *Oneida Indian Nation v. New York*, 691 F.2d 1070 (2nd Cir. 1982); *Cayuga Indian Nation v. Cuomo*, 565 F.Supp. 1297 (N.D.N.Y. 1983). *See* Sup.Ct.R. 17.1(a).

And fourth, the First Circuit's refusal to hear petitioner ignores Court of Claims precedent. *Tully v. United States*, 32 Ct.Cl. 1, 7-8 (1896) (recognition of tribe by executive officers accepted by courts).

Respondent Town also argues that petitioner is neither federally recognized nor included on the current listing of federal Indian tribes (Town Opp.Br. 7 n. 1), and that "sev-

eral of the documents appended to the petition as 'Appendix B' were introduced into evidence during the *Mashpee I* trial." *Id.* at 10.

To begin with, the federal documents included in "Appendix B" to instant petition show petitioner was officially listed by the Bureau of Indian Affairs (BIA) and its predecessors as an Indian tribe of the United States. And as the federal government recently admitted, neither petitioner nor its Reservation have ever been federally terminated (Pet.App. B). Thus, petitioner has every right to be on the current BIA list.[1]

Such a situation, however, is not without precedent. In *City of Saulte Ste. Marie v. Andrus*, 532 F.Supp. 157 (D.D.C. 1980), it was pointed out that because of "earlier [BIA] errors and omissions" the Chippewa Tribe, which should have been federally recognized in 1934, was overlooked. But the court, after discussing Chippewa history including federal recognition during the 1800s, held the Secretary of the Interior acted properly when in 1972 he subsequently recognized the Chippewas.

In short, the current official BIA list is not etched in stone and petitioner believes the Mashpees' present predicament is akin to the Chippewas' in *City of Saulte Ste. Marie v. Andrus*.

Respondent's contention that some of the federal documents (which it does not identify) were submitted to the *Mashpee I jury* along with *over 600* other exhibits, misses petitioner's point. *A jury had no place* in *Mashpee I*.[2] *Tribal existence is a question of law only for a judge* to determine,

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[1] Most of the tribes listed along with the Mashpees on the older lists are included on the current BIA list. *Compare* Pet.App. B. with 44 Fed. Reg. 7234-37 (February 6, 1979).

[2] The entire *Mashpee I* procedure has been seriously questioned in *Mashpee Revisited*, American Indian Journal, November 1980, p. 19, and in Clinton & Hotopp, *Judicial Enforcement of the Federal Restraints On Alienation Of Indian Land: The Origins Of The Eastern Land Claims*, 31 Me.L.Rev. 17 (1979). During the *Mashpee I* trial, the District Judge told the jury: "(A)s you perhaps gathered,

Wilbur v. United States, *supra*, and the federal political recognition binds the courts. *United States v. Holliday*, *supra*. Thus, a federal judge should have examined the federal and state documents[3] as the basis for his decision. But not only the *Mashpee I* District and Circuit Court opinions *did not mention any* of the federal or state documents in 1978 and 1979, those same courts in 1982 and 1983 refused even to acknowledge these documents, let alone address any of petitioner's arguments concerning those documents in their motion to vacate and substitute judgment.

Respondents further argue there are no "exceptional circumstances" warranting recall of mandate, (Town Opp.Br. 8-10), and the motion to vacate and substitute judgment was not timely filed (Atty.Gen. Opp.Br. 7).

Petitioner contends that under the unique circumstances of this case, respondents' arguments again are frivolous.

In *United States v. Joseph*, 94 U.S. 614 (1876), this Court, noting that the prior sovereign, Mexico, had made the Pueblo Indians of New Mexico citizens and had granted the Indians their lands in fee simple, held the Pueblos did not constitute Indian tribes under federal guardianship and their lands were not subject to federal alienation restriction.

'tribe' is a fluid word having many different meanings to many different people; and ultimately, you'll have to work with a definition that I will have to give you, a prospect I look forward to with some intrepidation [sic]." (*Mashpee I* Tr. 26-72, 23 November 1977). Both during and after the trial, the parties and the District Judge questioned the relevance of all the purported "relevant times" submitted to and passed on by the jury *except 1976*. *See Mashpee I*, 447 F.Supp. at 947-948. And in upholding the lower court, the First Circuit applied the rule that a jury verdict will be upheld if there is any view of the evidence supporting it. *Mashpee I*, 592 F.2d at 590. Application of this standard led to some pretty far-reaching speculation and surmise. And if there never should have been a jury, most of the *Mashpee I* appellate opinion is surplusage anyway because most of the opinion is devoted to trying to justify what the jury said and did.

[3] Under the circumstances of this litigation, the numerous official State reports and maps recognizing petitioner and its reservation (*see, e.g.*, Pet.App. C) are admissions against interest.

But almost *four decades later*, *United States v. Sandoval*, 231 U.S. 28 (1913) overruled *Joseph* because statements by the territorial court there relied on "are at variance with other recognized sources of information, now available." 231 U.S. at 49. *Sandoval* held the Pueblos *were* federal Indian tribes and their lands *were* subject to federal alienation restriction.

Instant petitioner now, is in much the same position as the Pueblos were after *Joseph*.

Because of respondents' uncontested jury demand (Pet. 5), and because crucial federal and state documentation establishing petitioner's status as a matter of law was never considered by a federal judge, petitioner believes their tribe and their lands have been denied the federal protection they are entitled to as a matter of law.

If in *Sandoval*, this Court was willing to consider "other recognized sources of information" not brought to its attention in *Joseph* and overrule after a forty year lapse, there was absolutely no reason the First Circuit should not have done the same in instant petitioner's case after only a four year lapse. In fact, the *Joseph* Court likened the Pueblos' condition to that of northeastern Indians such as the Senecas and Oneidas of New York. 94 U.S. at 617. Just as the Pueblos were under Mexico's guardianship and held their lands subject to sovereign alienation restriction before entering the Union, so the New York and Massachusetts tribes were under first Crown then State guardianship with sovereign alienation restriction on their lands when the United States Constitution became operable on March 4, 1789.[4] So if the Pueblos are federally protected, instant petitioner is also entitled to federal protection:

[4] The extent of State power over Indian affairs even during the Confederation period has been questioned. *See Oneida Indian Nation v. New York*, *supra*, 691 F.2d 1070. However, this case does not raise the issue of pre-1789 State action.

> Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over *all dependent Indian communities* within its borders, whether *within its original territory* or territory subsequently acquired, and whether within or without the limits of a State.

United States v. Sandoval, 231 U.S. at 45-46 (emphasis added).

Accordingly, petitioner does not believe this Court should allow the First Circuit to doom the Mashpees to oblivion simply because of procedural aberration and questionable representation in the trial court.

Finally, respondent Town misrepresents *Mashpee II* as involving the "same land", "same defendants" and "same legal theories" (Town Opp.Br. 11). Inasmuch as *Mashpee II* will be the subject of a separate petition for certiorari, instant petitioner's discussion will be brief.

First, significantly more land is claimed in *Mashpee II*. Second, while *Mashpee I* named only a class of private defendants, *Mashpee II* includes federal and state defendants (*i.e.*, James G. Watt, Commonwealth of Massachusetts). Third, while the *Mashpee I* plaintiff based its claim solely on the Nonintercourse Act (25 U.S.C. § 177), the *Mashpee II* plaintiffs base their claims primarily on the federal Indian common law as an incident of federal sovereignty and as incorporated in the commerce and treaty clauses of the United States Constitution. *See Cayuga Indian Nation v. Cuomo*, *supra*, 565 F.Supp. at 1317-1320. And while respondents harp on "finality" in litigation, *Mashpee I* was dismissed at the "threshold" for lack of "standing" and therefore was not a final judgment on the merits. *See Mashpee I*, 592 F.2d at 579, 581, 589. So clearly the Mashpees have the greater equity.

Conclusion

For all the reasons stated above and in the petition, a writ of certiorari should issue to review the order of the Court of Appeals.

Respectfully submitted,

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